SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 409

STANDARD ELECTRICA, S.A.,
Petitioner,

v.

HAMBURG SUDAMERIKANISCHE
DAMPFSCHIFFAHRTS-GESELLSCHAFT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 19, 1967.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit printed in Appendix A hereto is reported in 375 F. 2d 943 (1967). It affirmed, with one judge dissenting, the final decree of the U. S. District Court for the Southern District of New York (McLean, U.S.D.J.) dismissing the complaint.

The opinion of the United States District Court for the Southern District of New York is reported in 262 F. Supp. 343 (1966) and is printed in the Appendix to Appellant's Brief in the Court of Appeals of which the required number have been filed with this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 19, 1967.

A petition for rehearing in banc was timely filed on May 3, 1967 and denied on May 18, 1967, with no opinion.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

Question Presented

Whether the aggregation and securing by a shipper of six packages of goods, with the number of packages visible, on a special platform called a pallet, in order to enable the ocean carrier to employ present-day automated and mechanical means in handling numerous packages simultaneously as a labor saving device, renders each aggregation of six packages a single "package" within the purview of Section 4(5) of THE U. S. CARRIAGE OF GOODS BY SEA ACT OF 1936 (46 USC, Section 1304 (5)), so that the carrier's liability is limited to $500 for each group of six packages, rather than each package in which the goods are contained.

Statute Involved

The statute involved is Section 4(5) of the U. S. Carriage of Goods By Sea Act of 1936 (46 USC, Section 1304 (5)), the relevant portions of which provide:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared

by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

"By agreement between the carrier, master or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named."

Statement of Case

This is an action in admiralty to recover from an ocean carrier for loss of cargo. The District Court had jurisdiction under 28 U.S.C. Sec. 1333(1).

The sole question is whether under 46 USC Sec. 1304(5) each group of packages secured on a pallet for mechanized handling, or each carton in which the goods are packed, is the package intended by the legislators. The District Court held each group was the "package", and the Court of Appeals affirmed.

The facts herein are not in dispute and they are set forth in full in the Stipulation of Facts (R. 10a-20a). The essential facts may be summarized as follows: The Petitioner was the buyer and consignee of a shipment of 2160 TV Tuners shipped by I.T.T. Export Corp. from New York to Rio de Janeiro, Brazil, on the M/S Jytte Skou in May, 1963. The vessel was operated by the Respondent, Hamburg Sudamerikanische Dampfschiffahrts-Gessellschaft, as a common carrier.

Forty TV Tuners were packed in each corrugated fibreboard box, or carton. There were 54 cartons in the entire shipment. Each carton was about 3 feet long, a foot and one-half wide and one foot high. Each carton weighed about 60 pounds, with the TV Tuners packed inside them. Six cartons were stacked on a pallet (palletized) in three

tiers, two cartons to each tier. The 54 cartons were shipped on a total of 9 pallets. The cartons were held on each pallet by four metal straps or bands one-half inch wide tightly secured, and a wooden deck was placed under the straps in order to prevent them and superimposed cargo from cutting into the cartons. The combined gross weight of each lot of 6 cartons palletized as described was 380 pounds.

The term "pallet" as used in the shipping industry means a liftable wooden platform or tray, exceeding 3′ in length and width, which is used for moving and stacking numerous packages such as cartons by mechanical means, i.e., fork-lift trucks, instead of individual handling by hand. See photographs, Exhibits "D" and "E".

The platform is a double one, there being approximately 4″ between the top and bottom platforms, which are separated by three wooden boards called "stringers". The cargo handler slides the two tines or blades of a fork-lift truck between the two platforms, and the platforms or pallet with the packages thereon are elevated by the fork-lift truck and moved from place to place or stacked for storage, one on top of the other. Pallets may also be used as a sling for loading packages into the ship by means of cables attached to the pallets.

By thus handling numerous boxes or cartons simultaneously, a saving in labor results and boxes or cartons are less susceptible to damage from careless individual handling.

The record does not show that any freight charges were saved because of the palletization of the packages. In fact there was no saving since the freight was charged on the cubic dimensions of the shipment.

Upon receipt of the shipment at New York, a dock receipt was given and a bill of lading was issued by the carrier to the shipper. The terms of the dock receipt and bill of lading are subject to the Carriage Of Goods By Sea Act, which applied to this shipment.

The bill of lading (Exhibit B), into which the dock receipt (Exhibit A) became merged, shows under the columnar heading: "No. of Pkgs.", not merely the figure 9, but "9 pallets". The term "pallets" is not shown in the columnar space which is headed: "Description of the Packages . . .".

When the carrying vessel arrived at the port of discharge, Rio de Janeiro, it was discovered that 7 pallets, upon which were stacked 6 cartons each, or a total of 42 cartons, were not discharged from the vessel as a result of a theft aboard the vessel by parties unknown. The manager of the carrier's agents at Rio de Janeiro, Hamburg Sud Agencias Maritimas S. A., in writing to the consignee-petitioner, ignored the pallets and admitted that simply "42 cartons" were not discharged from the ship.

Each carton contained 40 TV Tuners valued at $10 each, thus, the value of each carton was $400, or less than the $500 limitation of liability per package as specified in Sec. 4 (5) of the Carriage of Goods By Sea Act of 1936; no higher value was declared by the shipper. The value of the 42 lost cartons aggregated $16,800.

The carrier does not deny its liability for the loss but maintains that its liability is limited to $500 for each group of six cartons on each of the seven pallets lost, or $3,500.

Petitioner contends that the $500 limitation should apply to each of the "42 cartons" which the carrier's agent admitted were lost.

The carrier has paid to the petitioner the sum of $3,500 ($500 x 7 pallets) in accordance with its contention as to the extent of its liability, together with interest to date of payment. This payment was made without prejudice to the determination of the extent of the carrier's liability by the Courts, and was made solely to stop the running of interest to the extent of said payment.

Thus, the amount of damages remaining in dispute is $13,300.

Reasons for Granting the Writ

1. The principle involved in this case and its implications in the broad context of automation in shipping cargo is of paramount public importance.

The decision below is a crucial precedent which will nullify the Carriage of Goods By Sea Act by virtually abrogating carrier liability for cargo in the present era of automation. The majority below has held that when numerous packages are aggregated by a shipper for automated cargo handling en masse, each aggregation constitutes a single package within the purview of the Act, so that the carrier's responsibility for negligent loss of the cargo is limited to $500. for each group of packages, rather than each package in which the goods are packed.

With the recent spectacular proliferation of automation or mechanization in cargo handling in the shipping industry, if the decision below stands, it will have the effect of reducing the ocean carriers' liability in most cases in the future to mere token amounts. Under the circumstances, the remaining sections of the Carriage of Goods By Sea Act dealing with the carriers' responsibility for cargo may become of little consequence since in most cases the carriers' maximum liability would be insignificant compared to the value of each conglomeration of packages. The decision below may also have the deleterious effect of discouraging future aggregations of packages for mechanized handling, and shippers instead may revert to the former inefficient method of shipping packages singly.

The shipping industry is on the threshold of a revolutionary era in cargo handling. Soaring labor costs, due to numerous longshoremen's wage disputes in recent years, have caused mechanization or automation in cargo handling to become vitally important in the shipping industry. Special ships, equipment, and terminals have been and are being constructed to facilitate the handling of many pack-

ages simultaneously by mechanical means to supplant the former numerous handlings of single packages by hand. Many millions of dollars have been and will be invested in the mechanization program.

When packages of cargo are brought to a steamship company's pier, they must be removed from the truck or car, carried into the shed and stacked in piles until the ship arrives and is ready to receive the cargo; then the packages must be brought alongside the ship, loaded into the holds of the ship, stowed and secured from movement therein. Upon arrival at the port of discharge, the same handling must take place, but in reverse order, until the packages are delivered to the consignee.

Through mechanization, as many as 800 or more packages can be handled simultaneously by machines, quickly and efficiently. Thus, not only does the carrier enjoy great economies in labor costs, but also the cargo is less susceptible to damage and pilferage than when each package is handled singly by longshoremen.

"Palletization" by the shipper, which is involved in this action, is one form of consolidating numerous packages by stacking them on a pallet or platform for handling en masse by a forklift truck, quickly, safely and efficiently.

"Containerization" is an analagous form. The shipper loads numerous packages into large metal containers of various sizes. They are 8′ high, 8′ wide, and range in lengths from 10′ to 40′. The 40′ metal containers are usually trailers on wheels, which may be driven to the pier by tractor-trucks or rail, and then loaded into and onto the ships in a similar manner as the so-called "piggy-back" system on railroad cars.

A 40′ container or trailer can hold over 800 cartons the same size as the petitioner's. Since the T. V. tuners in each carton were worth $400., a 40′ container could hold $320,000 worth of cargo. If a container is lost or damaged, the cargo owner would probably waive the expense of a lawsuit since the lower court indicated his maximum recovery

would be only $500 for $320,000. worth of cargo. Thus, carrier's liability for cargo may become nugatory, *e.g.* 62 cents for a package worth $400.

While a metal container does not have the same physical appearance of a pallet on which numerous cartons are stacked and secured, they both involve the same principle, to wit: the aggregation by the shipper of numerous packages for simultaneous handling mechanically. The majority of the Court below treated them as one and the same, and even cited *United Purveyors* v. *M. V. New Yorker,* 250 F. Supp. 102, which is a case involving containerized packages, as a possible precedent. It would seem to follow that if an exposed pallet load of packages is held to be a "package," an enclosed metal container load of packages should *à fortiori* constitute a "package".

The majority of the Court below, *sua sponte,* cited at Appendix A, p. 29, note 4, an advertisement supplement in *The New York Times* of January 8, 1967 which deals solely with metal containers. At p. 7 of the supplement, is found a statement by Hon. John V. Lindsay, Mayor of the City of New York in which he states:

> "• • • • it is anticipated (that container shipping) will account for 75 per cent of total ocean freight carried within the next ten years. The City will spend some 20 million dollars for the development of a 135 acre, nine berth container terminal in Stapleton, Staten Island."

And, on the same page, Austin J. Tobin, Executive Director of the Port of New York Authority, refers to the "container revolution" and says:

> "Container traffic growth has been spectacular, and the movement to this medium is only in its infancy."

The commercial public engaged in international shipping all over the United States and the world, including exporters, importers, the marine industry, as well as the many

faceted shipping industry, will be seriously affected by the outcome of this case as the first important case dealing with the legal effect of combining numerous packages for mechanized cargo handling.

Since these revolutionary technological advances are obviously a novel concept in cargo handling, there is uncertainty and doubt as to what constitutes the "package" intended in the statute for limitation of liability purposes. Is it the carton in which the goods are contained, or is it the entire aggregation of packages? Is the carrier liable for $320,000., or $500., whenever it damages or loses one or several large metal containers holding many packages? This is the question which is tormenting the commercial public referred to above; it even makes the question of carrier's liability unimportant, if the package limitation applies to each container.

There are cases now pending in the lower Courts, and there will be numerous other cases, which depend or will depend primarily on the same principle as involved in the instant case.

The New York Times, as recently as May, 1967 reported that 41 containers of cargo were washed off the deck of the SS. *Summit* in heavy weather. One container alone held hundreds of packages of cargo valued at about $400,000. The total value of the cargo in the 41 containers is several million dollars.

The majority below obfuscated the situation in that instead of restricting its discussion to pallets, it also discussed metal containers and trailer vans and cited a case dealing with large metal containers, as well as citing an advertisement for containers. Thus, it is plain that the majority included "containerization" as well as "palletization" in their deliberations and blanket decision; but since metal containers *per se* were not strictly before the court, there is uncertainty as to the legal implications of the decision *vis-à-vis* containers.

With the expected proliferation of the said various types and forms of technological innovations in furtherance of mechanization in cargo handling, the principle involved herein will recur frequently since it is expected that 75% of all cargo will be containerized. And, palletization of packages is now a common method of shipping many types of cargo which is becoming increasingly important.

It is respectfully submitted that the importance and compounded confusion of this question calls for the review of the lower Court's decision so that final reliable and reasonable guidelines may be set as to how to apply the package limitation of liability statute in connection with the new momentous technological changes in cargo handling.

2. In construing the remedial statute literally, instead of liberally to effectuate the Congressional purpose, the decision of the majority below clearly violates the entrenched rules of statutory construction established by this Court in numerous decisions; and the decision exacerbates the very abuse that Congress was seeking to change.

The refusal of the majority to effectuate the policy behind the remedial statute is so patently contrary to law as established by this Court, that the dissenting judge felt constrained to admonish the majority that they ought not abdicate their judicial function.

The Harter Act of 1893, 46 USC secs. 181-195, is the statute regulating the ocean carriers' liability which antedates the Carriage of Goods by Sea Act of 1936. However, the Harter Act contained no provisions whatsoever with respect to package limitations of liability. As a result, the carriers inserted clauses in their bills of lading validly limiting their liability to nominal amounts such as $100. per package, or even less. This abuse induced Congress to incorporate Section 4 (5) into the Carriage of Goods By Sea Act, and constituted a change in policy. In this statute, Congress

provided that the carriers' maximum liability shall be no less than $500. per package in order to prevent the carriers from escaping liability for just claims by means of package limitation clauses, as they had been doing under the Harter Act. When Congress established the amount of the package limitation at $500. in the Depression in 1936 and before inflation, this amount was considered adequate to protect the cargo interests in most cases.

Distilled to its essence, the majority's opinion and decision may be stated as follows: (The words in quotation marks are the majority's.)

a. We know that the policy of the statute was "providing protection for the shipper" from the stipulations in the carriers' bills of lading since they are "contracts of adhesion" which were effectively limiting the carriers' liability to nominal amounts; and that Section 4(5) was enacted to insure "that the carrier may not reduce its maximum liability below $500 per package."

b. We know that when Congress used the term package in 1936, it had in mind "predictable" packages, that is, the usual receptacles in which the goods were commonly packed at that time, e.g., single cartons, cases, drums, bags, etc.

c. We know that in 1936 "technological advances", such as palletization of numerous packages occurring 30 years later as the result of the present revolutionary era of mechanization in cargo handling, were not foreseen by Congress.

d. Nevertheless, since the drafters of the statute did not say that unforeseen new "technological advances" such as palletized packages, should be excluded from the general term package, we hold that, within the purview of the statute, these unforeseen "technological advances" constitute a single package anyway—even if it may be an "inequitable application". We must construe remedial

statutes literally—not liberally. We may not presume any exceptions to general statutory terms despite the fact that the legislators did not have present day revolutionary innovations in cargo handling in mind when they used the term package; and we must so construe the statute despite the fact that it results in an aggravation of the very evil Congress sought to prevent, i. e. nominal liability due to package limitations. Therefore, the consignee should recover for the loss of 42 cartons worth $400 each, a maximum of only $83 per carton ($500 divided by six cartons) instead of a maximum of $500, which would result in full recovery.

If the foregoing summary and analysis of the salient points of the majority's decision seems incredible, it is epitomized in the following quotation from their opinion (App. A, p. 31):

> "Lastly, since the word "package" fairly includes the pallets as made up for shipment in this case, we do not deem it important that the drafters might not have foreseen this precise application at the time that this provision was enacted thirty years ago, see, e. g., *Cain* v. *Bowlby*, 114 F 2nd 519, 522-23 (10 Cir. 1940). If through the passage of time this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the courts."

But, in construing a statute, the rule, as established by this Court, is to the contrary. The inquiry should not be as to how comprehensively the meaning of a term may be extended, but rather, what did the *legislators intend* by the term.

This Court, as recently as April 1967, in *National Woodwork Manufacturers Asso.* v. *N.L.R.B.*, 87 S. Ct. 1250, held at page 1255:

> "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within

> the intention of its makers.' Holy Trinity Church v. United States, 143 U.S. 457, 459, 36 L. ed. 226, 228, 12 S. Ct. 511".

And, the rule established by this Court is that remedial statutes should be liberally construed to carry out the purpose of Congress.

On April 10, 1967, in *State Farm Fire & Casualty Co.* v. *Tashire,* 386 U.S. 523, this Court recently reiterated the rule with respect to remedial statutes at page 533:

> "* * * the present statute, * * * is remedial and to be liberally construed."

To the same effect, see:

> *Heitler* v. *U.S.*, 260 U.S. 438, p. 440 (1923);
> *Beckler Steel Co.* v. *Cummings,* 296 U.S. 74, p. 80 (1935);
> *Miller* v. *Robertson,* 266 U.S. 243, p. 248 (1924);
> *Socony-Vacuum Oil Co.* v. *Smith,* 305 U.S. 424, p. 431 (1938).

Not only is the lower court's decision contrary to the canons of construction of this Court in that the remedial statute was erroneously interpreted as if its purpose was to protect the carriers instead of the shippers, it is also inequitable and absurd.

The unfairness or inequity implicit in the prevailing decision is manifest. It holds that when a shipper stacks and secures six cartons each containing 40 TV Tuners on a special platform or pallet to enable the carrier to effect great economies resulting from mechanized handling, the consignee is entitled to recover from the carrier who negligently loses them—not a maximum of $500 per carton or package as contemplated by legislators at the time of enactment—but a maximum of only $83 per carton ($500 ÷ six). While on the other hand, if the same cartons were shipped singly by a careless shipper, the consignee

could recover the full value of each carton, up to the maximum of $500 or, as in this case, $400 for each carton. The total value of the 42 missing cartons is $16,800, and the Court allowed a recovery of only $3,500.

Not only is the decision inequitable to cooperative and efficient shippers, it brings about the very result which the overriding policy of the statute was designed to change —nominal recoveries resulting from package limitations on the basis of the carrier's bill of lading provisions.

The majority further contravenes the very purpose of the statute by holding that the carrier's maximum liability should be based—not on the actual number of packages lost—but, on the number of packages that the carrier chooses to show in its bill of lading. Thus, the majority "overruled" Congress and gave back to the carriers the power to limit their liability to nominal amounts by the simple expedient of not showing in their bills of lading the actual number of visible packages shipped, but instead, treating each group of packages as a single package. The error of this holding is especially manifest in view of the fact that the majority concedes that a bill of lading is a "contract of adhesion" that the shippers are powerless to alter and that the statute was enacted to protect the shippers from the carriers' bill of lading terms.

The prevailing decision is more than "inequitable". It produces an absurd consequence. The decision is impliedly predicated on the assumption that the policy of the statute was to penalize or discourage good commercial practices and progress in the use of "technological advances" in cargo handling, and to put the efficient and cooperative shipper at an unfair competitive disadvantage with his competitor who ships his packages singly and inefficiently.

The absurdity of the decision is compounded when one considers the fact that the inefficient shipper who does not palletize his packages pays the same or usually a lower freight charge, although his maximum recovery in this case

is six times as great as the efficient shipper; while the shipper who palletizes his cargo, as in the instant case, in addition to paying for the cost of the pallets and the straps and the upper deck, must pay additional freight charges for the space consumed by the pallets inasmuch as the freight charges are usually computed on the basis of the cubic measurement dimensions of the shipment.

The prevailing opinion erroneously states that the shipper should have declared a higher value and paid an additional *ad valorem* charge. Of course, this begs the question before the court as to which "package" constituted the package intended by the statute—the carton in which the goods were packed, or each aggregation of packages. In any event, it is absurd to hold that the shipper who palletizes his packages to enable the carrier to economize by handling cargo mechanically should pay an exorbitant additional *ad valorem* charge for the privilege of helping the carrier, while the indifferent shipper need not pay a higher freight charge and be entitled to the same recovery.

Thus, it is clear that the majority committed gross error in holding that in construing a remedial statute, it was required to apply the general term "package" literally to include present-day palletized packages despite the fact that this technological change was not in the minds of the legislators at the time they used the term 30 years ago—even if the result may be "inequitable" or absurd.

The prevailing decision flies in the face of numerous decisions of this Court to the contrary. This Court has repeatedly held that it is the duty of the Courts to construe statutes liberally so as to give effect to the intention of the legislators rather than to follow the letter of the statute where to follow the letter is to frustrate the Congressional intent, and where an inequitable or absurd application may result.

This duty is even more clear and compelling where a remedial statute is involved. The courts must construe such

a statute liberally in order to effectuate the legislative purpose and prevent the abuse legislated against. And, what is more, this Court has repeatedly held that statutes must be construed in accordance with the facts that existed contemporaneously with the enactment, and that exceptions must be presumed to general terms so as to limit them to the specific objects contemplated by the legislators. Again, this duty is even clearer where a literal interpretation would result in an inequitable or absurd result, through the passage of time, or otherwise.

The majority's decision clearly contravenes the rule restated by this Court as recently as 1965, in *Minnesota Mining and Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, wherein the courts' duty in construing statutes is set forth by citing Mr. Justice Holmes sitting on Circuit in *Johnson* v. *U. S.*, 163 F. 30, 32 as follows, at Page 321:

> "A statute may indicate or require as its justification a change in the policy of the law although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

And, the decision of the majority contravenes other precedents of this Court to the contrary. In *Bridge Proprietors* v. *Hoboken Co.*, 68 U.S. 116, this Court held at page 148, as follows:

> "It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."

The canons of statutory construction violated by the majority are stated in the often-cited case, *Holy Trinity Church* v. *U. S.*, 143 U.S. 457 (1891), wherein this Court at page 461 held as follows:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

And at page 462, this Court held:

> "The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."

And finally, this Court, at page 463, indicated the following:

> "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. U.S. v. Railroad Co., 91 U.S. 72, 79."

The foregoing canons of construction have been followed by this Court in more recent decisions. For example, see:

U.S. v. *Katz*, 271 U.S. 354, p. 357 (1926);
U.S. v. *Stewart*, 311 U.S. 60, 64 (1940);
Foti v. *Immigration Service*, 375 U.S. 217, 223 (1963);
Perry v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966);
Puerto Rico v. *Shell Co. (P. R.) Ltd.*, 302 U.S. 253, 258 (1937).

Since the dissenting opinion below admirably analyzes the majority opinion astutely, clearly and succinctly, petitioner respectfully refers this Court to the dissenting opinion to avoid duplication.

3. There is a sharp cleavage among the judges of the leading maritime Second Circuit in their approach to this important Federal question; the court below contravened without overruling several established analogous precedents in that Circuit as well as the Fourth and Fifth Circuits, thus unsettling the entire question, which has never been, but should be settled, by this Court.

As our economy changed from predominantly agricultural to industrial, cargoes became increasingly more valuable. As a result, package limitation of liability now overshadows the question of the carriers' liability in importance in many cases, irrespective of automation. The Second Circuit is the leading circuit in the number of decisions involving the package question. But, as evidenced by the sharp dissent in the instant case, as well as in several analogous package cases, there is a conflict among the various nine active judges in the Second Circuit (as well as the inactive judges) as to how to interpret the term "package". Some yield to considerations of expediency; others feel impelled to give effect to the policy behind the statute and to do justice and equity based on all the facts.

As one judge of the Second Circuit remarked in *Mitsubishi Int'l Corp.* v. *S.S. Palmetto State,* 311 F. 2d 382 (2 Cir. 1962), cert. denied 373 U.S. 922 (1963): "Once again presented to the Courts is the troublesome conundrum: When is a package not a package?" The answer now seems to be a matter of playing Russian roulette as to which Judges are drawn on the panel, thus spawning endless and needless litigation.

The majority below made an anomaly of numerous established precedents in analogous cases construing the term "package" by inconclusively contravening them without overruling or criticizing them.

The majority, recognizing the fact that Congress did not intend aggregations of numerous packages for mechanized handling as a single "package" resorted to the device of improperly, throughout its opinion, substituting the word "unit" for "package" in the statute. For example, the majority said:

> "Section 4(5) provided that the carrier may not reduce its maximum liability below $500 per package or unit." * * *
>
> "No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size. * * *." Appendix A, *infra*, p. 28.

But, the term "unit" is used in the statute only in connection with the freight charges for unpackaged or bulk cargo. It clearly means the unit of weight or measurement upon which the freight charges are based, e.g., $35 per ton or $39 per 40 cubic feet. That is to say, the term "unit" is used in the statute not to signify a package, or a group of packages, but as the basis of the freight charges with respect to unboxed cargo. The language of the statute itself refers to only two types of goods—goods shipped in packages and goods not shipped in packages. It does not mention or contemplate groups of packages, which are now common as the result of present-day mechanization.

In the *Edmund Fanning (Isbrandtsen* v. *United States of America)*, 201 F. 2d 281, (2 CCA—1953), the Second Circuit citing the Fourth and Fifth Circuits, held that the term "unit" as used in the statute does not refer to a shipping unit; nevertheless, the majority in the instant case, ignoring the precedents to the contrary, held that it did.

The precedents of the various circuits to the contrary which were ignored by the lower court are set forth in the *Edmund Fanning* case, *supra,* as follows on page 286:

> "The authorities have construed the words 'customary freight unit' to refer to the unit upon which the charge for freight is computed and not to the shipping unit. Waterman S. S. Corp. v. U. S. Smelting, Refining & Mining Co. (5 Cir.), 155 F. (2d) 687; The Bill (D. Md.), 55 F. Supp. 780, affirmed (4 Cir.), 145 F. (2d) 470; Middle East Agency v. The John B. Waterman, supra; cf. Stirnimann v. The San Diego (2 Cir.), 148 F. (2d) 141."

The *Edmund Fanning* case, *supra,* held that an unboxed locomotive was not a package, and therefore the $500 limitation must be multiplied by the number of 40 cubic foot units, which would allow full recovery. If the word "unit" is substituted for "package", as the majority below erroneously did, then a locomotive would be a "package" and the carriers' liability would then become $500 for the entire locomotive. The same erroneous reasoning would apply to all unboxed cargo such as automobiles, yachts, machinery, etc., thus contravening numerous decisions not only in the Second Circuit, but in the Fourth and Fifth Circuits as well.

To make matters more unsettled, the majority inconclusively refused to overrule the prevailing opinions, but merely alluded to the dissenting dicta in two analogous package cases involving a partly covered tractor and yacht on a cradle, *Gulf Italia* v. *American Export Lines* and *Pannell* v. *U.S. Lines,* thus further muddying the waters as to these recurring types of cases.

In *Gulf Italia* v. *American Export Lines,* 263 F. 2d 135 (2 CCA—1959), the Second Circuit established certain principles in considering whether a tractor which was partly covered by paper and wooden planking was a pack-

age under the statute. The majority there held as follows at page 137:

> "Section 4(5) of the Act divides 'the transportation of goods' into two categories: 'packages' and 'goods not shipped in packages'. Plainly the tractor was not shipped *in* a package, unless the covering of certain portions of it make it a 'package' within the meaning of the Act. Apparently the Appellant contends that any preparation of goods for ocean transportation converts the goods into a 'package'. Such a construction of the section would cause a 'shipper who attempts to minimize possible harm to his property by putting protective covering on sensitive parts', to be placed in a worse position than a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilfering. We agree with Judge Cashin that 'such result would hardly foster good commercial practices'. Any test dependent upon extent of external covering would lead to uncertainty and increased litigation. We cannot believe that Congress intended 'package' to be defined in a way to produce such a result. The District Court was correct in holding that the tractor was not a 'package'."

And, in the lengthy dissent in the *Gulf Italia* case, *supra,* alluded to by the majority in the instant case, the dissenting judge criticized a lower court decision pertaining to machinery shipped on a skid. A skid is a platform similar to pallet, except it is single instead of double. The dicta conflicts with the majority in the instant case. If, as the dicta indicated, a machine secured on a skid should not be a package, why should six packages secured to a pallet constitute a single package?

The dissenting Judge in the *Gulf Italia* case, *supra,* made the following remarks, at page 138:

> "To hold a piece of machinery a package simply because it has skids attached and to limit liability for damage to $500 where the same machinery without skids, if large or heavy, would subject the carrier to much greater liability for loss, seems unrea-

> sonably to extend the meaning of 'package' and to bring about a result that is highly inequitable."

In *Pannell* v. *United States Lines*, 263 F. 2d 497 (2 CCA—1959), the majority, speaking of a yacht shipped on a cradle, or concave platform, on the deck of a ship stated at page 498:

> "It is true that if the Act applied *ex proprio vigore*, the yacht, like the tractor in the Gulf Italia case, could not be deemed a 'package' and the parties by so describing it, could not reduce the carrier's liability."

Not only do the principles enunciated in the above two cases conflict with the instant decision, but in addition, the majority alluded to the dissents in the above cases in such a vague manner that the law with respect to the package question has become so beclouded and inconsistent that it is impossible to predict the outcome of analogous cases, such as cargo shipped on skids, partly covered cargo and boats shipped on cradles.

Unfortunately, the Court of Appeals denied this petitioner's petition for a re-hearing in banc; therefore there are no longer any guiding principles, and the outcome of analogous litigation is now a matter of pure speculation. Did the majority decision in this case overrule the analogous cases by simply ignoring the prevailing opinions and citing the dissenting dicta? And, if so, to what extent? Is a "unit" now a "package"? Without years of new litigation it is impossible to know the implications of the prevailing decision.

Thus, it is manifest that the majority contravened and ignored contrary precedents of the Second, Fourth and Fifth Circuits rather than overruling them, and has rendered this important question so confused and unsettled that only the intercession of this Court can help to resolve it. This Court has never considered this important question, except to hold that a stevedore may not limit its liability in *Herd* v. *Krawill*, 359 U. S. 297.

Conclusion

For the reasons stated above, the petitioner respectfully requests this Court to issue a Writ of Certiorari to the Court of Appeals to review the important question presented herein.

Respectfully submitted,

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July 14, 1967.

APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 252—September Term, 1966.

(Argued December 8, 1966 Decided April 19, 1967.)

Docket No. 30855

STANDARD ELECTRICA, S.A.,
Plaintiff-Appellant,

v.

HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT,
Defendant-Appellee,

and

COLUMBUS LINES, INC.,
Defendant.

Before:

LUMBARD, *Chief Judge,*

HAYS and FEINBERG, *Circuit Judges.*

Libellant appeals from a judgment of the United States District Court for the Southern District of New York, Edward C. McLean, *J.*, entered August 25, 1966, denying its motion for summary judgment and dismissing its complaint for additional damages for the loss of cargo shipped in "pallets" on the grounds that liability was limited under 46 U. S. C. § 1304(5).

Affirmed.

SEYMOUR SIMON, New York, N. Y. (RICHARD T. GRAHAM, New York, N. Y., on the brief), for plaintiff-appellant.

WHARTON POOR, New York, N. Y. (R. GLENN BAUER, PETER J. ZAMBITO and HAIGHT GARDNER POOR & HAVENS, New York, N. Y., on the brief) for defendant-appellee.

LUMBARD, *Chief Judge*:

Libellant Standard Electrica, S.A., appeals from a judgment entered by Judge McLean in the Southern District of New York, on August 25, 1966, denying libellant's motion for summary judgment made pursuant to Rule 58 of the Admiralty Rules of the United States Supreme Court, and dismissing its complaint seeking $13,300 from the defendant-appellee, Hamburg Sudamerikanische Dampfschiffahrts-Gesellschaft, as additional damages for the loss of 1,680 television tuners shipped from New York to Rio de Janeiro.[1] The entire shipment consisted of nine "pallets," each containing six cardboard cartons of 40 tuners. Seven of the nine pallets were never delivered, and appellee has conceded its liability; the only question is the amount of that liability.

The parties agree that the provisions of the Carriage of Goods by Sea Act of 1936 (hereinafter COGSA) are applicable, and limit recovery to "$500 per package." Section 4(5), 46 U. S. C. § 1304(5).[2] The sole issue on

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[1] The libel and complaint against defendant Columbus Lines, Inc., was dismissed on the consent of all parties.

[2] 46 U. S. C. § 1304(5): "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier."

appeal, as below, is the meaning of the word "package" for purposes of that limitation. It is libellant's contention that each cardboard carton qualifies as a package, and that the "palletized" form in which those cartons were received for shipment ought to be regarded as nothing more than a mechanical aid for delivery. Judge McLean held, however, that each pallet constituted a package within the meaning of § 4(5) of the Act. As the defendant had previously paid libellant $3,500, $500 for each of the seven missing pallets, together with interest, libellant's motion was denied and the libel was dismissed. We agree with Judge McLean's ruling and affirm the judgment below.

The parties stipulated that all of the pallets were made up by the shipper, I. T. T. Export Corporation, in the following manner:

> As a base there was a wooden platform measuring 39" in length and 33" in width constructed of two floors about 4" apart nailed to three 2" x 4" stringers. On this platform were placed six corrugated fibreboard cartons, each containing 40 T.V. Tuners. The cartons were stacked in three tiers of two cartons each. Each tier completely covered the platform. The dimensions of each of the cartons were 33½ inches long, 19 inches wide and 12½ inches high. Each carton weighed 60 pounds with 40 T.V. Tuners packed inside. Over the top tier of these cartons was fitted a wooden deck approximately ½ inch thick, the same width and length as the platform upon which the cartons were placed. The purpose of the top wooden deck was to prevent other cargo and the straps from cutting into the top two cartons. Four metal straps ½ inch wide were fitted over the top of the wooden deck, down the sides of the cartons and underneath the platform where their overlapping ends were fastened tightly together with metal seals. Two of these

straps ran lengthwise and two ran crosswise. When bound together with the metal straps the dimensions of each pallet were 39" in length, 33" in width and 42" in height. The gross weight of each pallet was 380 lbs.

When COGSA was enacted in 1936, it had as its central purpose the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power. See Gilmore & Black, Admiralty 125-26 (1957); *Caterpillar Overseas, S.A.* v. *Expediter,* 318 F. 2d 720, 722 (2 Cir. 1963); *Jones* v. *Flying Clipper,* 116 F. Supp. 386, 388-89 (S. D. N. Y. 1953). Section 4(5) provided that the carrier may not reduce its maximum liability below $500 per package or unit. See also 46 U. S. C. §1303 (8). At the same time, §4(5) cast upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wished to impose a higher liability upon the carrier. See *Caterpillar Americas Co.* v. *S.S. Sea Roads,* 231 F. Supp. 647 (S. D. Fla. 1964), aff'd, 364 F. 2d 829 (5 Cir. 1966); also *Morrisey* v. *S.S. A. & J. Faith,* 252 F. Supp. 54 (N. D. Ohio 1965).

In determining the meaning of "package," we are without the aid of meaningful legislative history. Only certain general observations may be made as to the reason why "package" was selected as an appropriate unit upon which the limitation of liability was placed in our 1936 Act, and in the English Act of 1924, which is similar. No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size,[8] and one that would provide a com-

[8] One old English case suggests the contrary, *Whaite* v. *The Lancashire & Yorkshire Railway Co.,* L. R. 9 Ex. 67 (1874), where a large open top wagon was held to be a package: "It would be absurd to say that a wagon was too large to be a package; plainly, size cannot be a criterion." Cleasby, B. concurring. See also *Reid* v. *Fargo,* 241 U. S. 544 (1916) which was specifically referred to in the Hearings Before the Committee on Commerce, United States Senate, 74th Congress, 1st Sess., on a Bill relating to Carriage of Goods by Sea, May 10, 1935, pp. 38, 39.

mon sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation.

Few, if any, in 1936 could have foreseen the change in the optimum size of shipping units that has arisen as the result of technological advances in the transportation industry. As both parties recognize, it is now common for carriers to receive cargo from their shippers in a palletized form or "containerized" form. In some instances an entire trailer may be uncoupled from its tractor-truck on the pier and placed aboard the carrier.[4] With the exception of Judge McLean's opinion below, 262 F. Supp. 343 (S. D. N. Y. 1966), and possibly *United Purveyors, Inc.* v. *M. V. New Yorker,* 250 F. Supp. 102 (S. D. Fla. 1965), no court has yet considered how the limitation of liability is to be construed in light of this technological change.

Libellant's principal contention is that a pallet is merely a mechanical device that is to be used in conjunction with a forklift and other machinery in order to facilitate loading. Certain benefits will accrue to the carrier through the use of pallets, namely, less damage to cargo and less labor cost over the long run, as the result of the decrease of individual handling required for items of a lesser size. Libellant does not argue that these are functions not normally performed by packaging in general, but suggests only that we should disregard the pallet and look to the cardboard boxes for the purposes of the limitation. In support of this contention, libellant argues that COGSA is a remedial statute and should be interpreted broadly to protect the

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[4] Large container ships and trailer ships are being built in order to accommodate such special cargo. See, e.g., N. Y. Times, January 8, 1967, § 13 (advertisement). The acceptance of such shipping units gives rise to other exciting possibilities, such as the loading of vessels from "inland ports" by sky-crane helicopters. See, e.g., New York Times, January 28, 1967, p. 29, cols. 6, 7 and 8. Economies, if realized, will only serve to foster the use of large shipping units.

rights of shippers; that statutory provisions setting forth a limitation of liability should be strictly construed so as to decide all questionable cases in favor of its non-applicability and that $500 a package provides a much more stringent limitation than it did 30 years ago. Since the change in optimum size of a shipping unit could not reasonably have been foreseen, he argues, we should rule that the outer casing was merely a mechanical device and not a package.

Libellant's contention overlooks a number of factors. First, it does not take into account the characterizations of the parties themselves. The dock receipt, the bill of lading, and libellant's claim letter all indicated that the parties regarded each pallet as a package. On the dock receipt the "Marks and Numbers" were given as "1/9 #" and the "No. of Pkgs." as "9 pallets." The invoice from the shipper to the libellant described the goods as follows:

> "Numbers on the packages: 1/9
> Quantity: 9
> . . . . "

After the loss was dicovered libellant sent a letter to appellee's agent complaining that "only 2 packages were discharged" out of "a shipment of 9 packages." Inasmuch as we are not faced with a case where the parties have attempted to define the word package by their agreement in a manner that might be repugnant to the Act, see, e.g., *Pannell* v. *United States Lines Co.*, 263 F. 2d 497, 498 (2 Cir.) (dictum), cert. denied, 359 U. S. 1013 (1959), we think such characterizations are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a "package" and reflect the meaning given that term by the custom and usage of the trade. Each pallet had the physical characteristics of a package and was clearly a "bundle put up for transportation." Black, Law Dictionary (4th ed. 1951).

Secondly, it was the shipper and not the carrier who chose to make up the cartons into a pallet, apparently for the reasons of greater convenience and safety in handling. The number of separate units received from the shipper is what is considered for the purposes of the bill of lading. As in this case, the number of inner cartons is not apt to be mentioned in any of the shipping documents prepared at the time of contract. Yet the parties, and courts necessarily, rely upon the shipping documents for information in the event of loss, see, e.g., *India Supply Mission* v. *S.S. Overseas Joyce,* 246 F. Supp. 536, 538 (S. D. N. Y. 1965), and cases cited therein, and it would seem immaterial that the number of individual cartons within each pallet might have been visible to the workmen on the pier. Cf. *Anticosti Shipping Co.* v. *Viateur St. Amand* [1959] 1 Lloyd's Rep. 352 (Supreme Court of Canada).

Thirdly, it does not take into account the fact that § 4(5) specifically provides that the shipper, at his option, can obtain full coverage simply by declaring the nature and value of the goods in the bill of lading, and, if necessary, paying a higher tariff, and thereby avoid the "outdated" limitation.

Lastly, since the word "package" fairly includes the pallets as made up for shipment in this case, we do not deem it important that the drafters might not have foreseen this precise application at the time that this provision was enacted thirty years ago, see, e.g., *Cain* v. *Bowlby,* 114 F. 2d 519, 522-23 (10 Cir. 1940). If through the passage of time this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the courts.

We are mindful that any other decision would only contribute to confusion as to the meaning of the word "package" as used in § 4(5), see, e.g., discussion of prior cases in *Mitsubishi Int'l Corp.* v. *S.S. Palmetto State,* 311

F. 2d 382 (2 Cir. 1962), cert. denied, 373 U. S. 922 (1963); *Gulf Italia Co.* v. *American Export Lines, Inc.*, 263 F. 2d 135, 138 (2 Cir.) (dissenting opinion), cert. denied, 360 U. S. 902 (1959), and would place upon the carrier the burden of looking beyond the information in the bill of lading or beyond the outer packing to investigate the contents of each shipment. Only if "package" is given a more predictable meaning, will the parties concerned know when there is a need to place the risk of additional loss on one or the other accordingly or adequately to insure against it.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

Appellant consignee never received 1,680 TV tuners worth $16,800, and appellee concedes it is liable for the loss. However, appellee limits its liability to $3,500. Therefore, appellant has been denied $13,300, which it has lost through no fault of its own. For insufficient reasons the majority opinion approves this inequitable result and disregards the strong policy behind section 4(5) of COGSA.

The purpose of section 4(5) when enacted in 1936 was to protect cargo interests like appellant. Prior to that time, seagoing carriers had been able to limit their liability for loss of cargo to insignificant amounts. See *Jones* v. *The Flying Clipper*, 116 F. Supp. 386, 388 & n. 10 (S. D. N. Y. 1953). Raising the minimum liability limitation to $500 per package was a very substantial concession by carriers to cargo interests. See *Pan-Am Trade & Credit Corp.* v. *The Campfire*, 156 F. 2d 603, 605-06 (2d Cir.), cert. denied, 329 U. S. 774 (1946). This the majority concedes. Therefore, one would think that in a close case section 4(5) would be construed consistently with that purpose—to protect the cargo interest. This is, of course, a close case; the majority opinion professes to find no controlling precedent or mean-

ingful legislative history defining "package." I do not suggest that the definition or its application to particular facts are simple matters. Once again we have "the troublesome conundrum: When is a package not a package?" *Mitsubishi International Corp.* v. *S.S. Palmetto State,* 311 F. 2d 382, 383 (2d Cir. 1962), cert. denied, 373 U. S. 922 (1963). More precisely, here the question is which claimed package was *the* package under section 4(5)—each sixty pound carton with forty TV tuners packed inside, or each "pallet" of six cartons strapped on a loading platform with a board on top, with open sides plainly exposing the cartons? Obviously, reasonable men can differ as to whether the "pallet" is literally a package; that being so, I suggest that the clear policy of the statute should be decisive unless there is controlling precedent to the contrary. I do not read the majority opinion as suggesting that there is.

In *Mitsubishi,* at 311 F. 2d 384, this court emphasized in finding a "package" that the article there (steel) was "completely enclosed in a wooden box prepared for shipment." In *Gulf Italia Co.* v. *American Export Lines, Inc.,* 263 F. 2d 135, 137 (2d Cir.), cert. denied, 360 U. S. 902 (1959), this court made the same point in finding no package. ("Plainly the tractor was not shipped *in* a package, unless the covering of certain portions of it make it a 'package' within the meaning of the Act.") I would normally expect a package at least to completely enclose the goods in question. Here, the tuners were completely enclosed in cartons—each carton was obviously a package. Strapping six cartons together on a platform with a board on top "to prevent other cargo and the [four metal] straps from cutting into the top two carton"[1] did not make a package out of the six cartons, since the pallet was not also enclosed on the sides. I realize that problems will remain on how to deal with other large units in the future, *e.g.,* "fishyback" trailers. I suggest that we decide such cases when they arise, emphasizing now only the minimum requirements of a package.

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[1] Stipulation, ¶5.

None of the reasons the majority has given is adequate to support the unfair result here. First, the characterization of the transaction by the parties to a contract of adhesion, see *Caterpillar Overseas, S.A.* v. *S.S. Expediter,* 318 F. 2d 720, 722 (2d Cir.), cert, denied, 375 U. S. 942 (1963), should not be controlling. *Cf.* section 3 (8) of COGSA, 46 U. S. C. §1303(8); G. Gilmore & C. Black, Admiralty 167 n. 156 (1957). Moreover, in this case, whether the parties did consider the pallets to be the statutory packages is ambiguous at best; *e.g.*, appellee's own agent referred to "the loss of 42 cartons."

Second, the majority opinion points out that the shipper, apparently for reasons of convenience and safety, and not the carrier chose to make up the cartons into a pallet. This would seem irrelevant. The opinion concedes that carriers also benefit from the use of pallets; indeed, in footnote 4, it refers to other "exciting possibilities" of large shipping units, presumably desirable to carriers as well as to shippers. Attaching no significance to which party loaded the cargo on board the vessel, the majority considers crucial the number of units received from the shipper, which it equates with the number of packages, arguing that "the number of inner cartons is not apt to be mentioned in . . . the shipping documents. . . ." This, of course, assumes the conclusions that a carton is not a unit and—by calling these plainly visible cartons "inner cartons"—that the cartons were not packages. See also 49 U. S. C. §100, made a part of COGSA by 46 U. S. C. § 1303(4), discussed in *American Trading Co.* v. *The Harry Culbreath,* 187 F. 2d 310 (2d Cir. 1951).

Third, the majority implies that this shipper could have obtained full coverage by declaring the nature and value of goods and, if necessary, paying a higher tariff. But if each carton was a package, there would be no occasion for a special declaration at a higher charge, since each carton was worth less than $500. Thus, finding

significance in failure to declare merely begs the question of how to construe the word "package."

Fourth, the majority concedes that the $500 package limitation may have become inadequate and its application inequitable, but asserts that revision must come from Congress, not the courts. Inadequate it has become; technological advancement and decline in the purchasing value of the dollar have combined to reduce the meaning of the $500 minimum liability limitation Congress gave to cargo interests. But I do not understand why we should add to the inequity. The call for congressional revision may be sound, but in the meantime we should construe the existing statutory term as applied to the facts before us in consonance with its legislative purpose. That judicial function we ought not abdicate.

Finally, the majority's result is justified as giving "package" a more predictable meaning. I am not sure what the "certain" definition of package is that the majority relies upon, but I suggest that, in any event, certainty at the expense of legislative policy and equity is undesirable and often turns out to be ephemeral.

I would reverse.